IN THE

Supreme Court of the United States

October Term, 1925.

No. 299.

THE EARLY & DANIEL COMPANY, *Appellant*,
vs.
THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF ON BEHALF OF APPELLANT.

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April 8, 1926.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF THE CASE.

This is an action on an implied contract for the recovery of $22,000, said sum being the balance due on 4,000,000 pounds of hay delivered by The Early & Daniel Company to the Government during the months of November and December, 1917. (R. 7).

Under date of July 31, 1917, appellant entered into

a contract with S. C. Vestal, Lieutenant-Colonel, Quartermaster Corps, United States Army, acting for and on behalf of the defendant, whereby the appellant agreed to furnish and deliver and the defendant agreed to buy from the plaintiff during the period commencing August 1, 1917, and ending September 30, 1917, such hay as might be required during July and the first half of August of 1917, not to exceed 6,000,000 pounds at 97½ cents per hundred pounds, and such hay as might be required during the last half of August and all of September, 1917, not exceeding 6,000,000 pounds, at 95 cents per hundred pounds, to be delivered f.o.b. cars at Newport News, Virginia, subject to call of the defendant in lots of not to exceed 1,000,000 pounds per lot. (R. 3.)

Calls were made under the contract as follows:

Call No. 1 for 500,000 pounds, dated August 15, 1917;

Call No. 2 for 1,050,000 pounds, dated August 20, 1917;

Call No. 3 for 2,000,000 pounds, dated September 5, 1917;

Call No. 4 for 4,450,000 pounds, dated September 12, 1917; and

Call No. 5 for 4,000,000 pounds, dated September 25, 1917. (R. 4.)

Appellants complied with the first four calls under the contract, but refused to fill the fifth call of September 25, 1917, on the ground that (1) owing to causes beyond the control of plaintiff, which causes were well-known to defendant, it was impossible to comply with such call within the contract period, and (2) the call was irregular and improper, being for an amount in excess of 1,000,000 pounds. (R. 5.)

During the contract period transportation conditions were very abnormal and plaintiff experienced numerous difficulties in securing deliveries at Newport News, the average period required to fill an order being 25½ days. Every effort was made by plaintiff to secure prompt movement of cars. (R. 4.)

Nothing further was said about filling the fifth call until November 9, 1917, when plaintiff received a telegram from Colonel Knight inquiring about plaintiff's intentions of completing the contract. Plaintiff's Vice-President immediately went to Newport News and asked that plaintiff be given time to put the matter up to Washington for a decision, which Colonel Knight agreed to do. However, on November 15th the Camp Quartermaster again wired plaintiff that unless the hay specified in the fifth call was delivered, purchases would be made in the open market and charged to plaintiff's account. After an exchange of telegrams, plaintiff agreed on November 21, 1917, to fill the fifth call under protest and take the matter up with the proper authorities at Washington. (R. 5-6.)

Plaintiff delivered under protest the 4,000,000 pounds of hay demanded by the Camp Quartermaster. The contract price was $19 per ton, while at the time of delivery the market price of hay was $30 per ton. The amount paid plaintiff for the 4,000,000 pounds of hay delivered was $38,000, while the market value thereof was $60,000, and plaintiff therefore claims the difference of $22,000. (R. 6.)

ARGUMENT.

I.

THE TERMINAL DATE OF THE CONTRACT.

The contract of July 31, 1917, entered into between the Government and claimant covered requirements for the "last half of August and September," and required claimant to "*furnish and deliver* during the period commencing August 1, 1917, and ending September 30, 1917," the supplies under the contract. The contract contained the further provision that all the goods were "to be delivered within three months from date of first call." (R. 3-4.)

In its decision the Court of Claims found that the plaintiff "had until November 15, 1917, being three months from the date of the first call, August 15, 1917, to complete its deliveries on this contract." (R. 5). It is respectfully submitted that the contract terminated on September 30, 1917, and that the provision requiring delivery of all goods under the contract within three months from the date of the first call was in direct conflict with the true intent of the contract and therefore that such provision cannot be considered in reaching a conclusion as to the terminal date of the contract.

In the case of *A. Leschen & Sons Rope Co. vs. Mayflower Gold Mining & Reduction Co.*, 173 Fed. 855, the Court stated:

> "The intention of the parties, when manifest, or when ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or the dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

The rule was further considered in *O'Brien vs. Miller*, 168 U. S. 287, in which case the Court said:

> "The elementary canon of interpretation, is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."

Canal Co. vs. Hill, 15 Wall. 94;
United States vs. Stage Co., 199 U. S. 414.

Under the construction given the language of the contract by the Court of Claims, had the Government failed to make any calls under the contract until just prior to September 30, 1917, the contract would not have expired until the latter part of December, 1917. This was clearly not the intention of the parties as expressed in the contract. The contract required the claimant to furnish and deliver during August and September hay to meet the requirements of said two months. It is difficult to see how hay delivered in November or December, 1917, could be held to cover the requirements for August and September, 1917.

It seems to be a well-settled rule of law that where two provisions in a contract, one specific and the other general, are in conflict, the specific provision must take precedence. It is therefore submitted that the Court of Claims has erred in holding that the period of the contract was extended until November 15, 1917, by the provision in question, which provision is so obviously inconsistent with the true intent of the parties under the contract.

II.

THE CALL OF SEPTEMBER 25, 1917, WAS NOT WITHIN THE CONTRACT.

(a) *Irregularity of Call.*

Under the provisions of the contract, hay was to be delivered under calls to be made by the Government in lots of not to exceed 1,000,000 pounds per lot. It was contended by Counsel for the Government that inasmuch as the last three calls under the contract were for lots in excess of 1,000,000 pounds, and as claimant had made no objection on such ground to calls Nos. 3 and 4, but had furnished hay under such calls, it was estopped from objecting to the irregularity of the fifth call, which was for 4,000,000 pounds. It is true that claimant, by the delivery of the hay required by calls Nos. 3 and 4, did acquiesce in the irregularity of such calls, but such acquiescence cannot under any rule of law be construed as a waiver of its right to make objection to the last call. The Court of Claims upheld claimant on this point, stating that "the plaintiff would have been within its rights under the contract if it had adhered to its refusal to deliver the 4,000,000 pounds of hay." (Tr. 8.)

(b) *Impossibility of Delivery Within Contract Period.*

As heretofore stated, the contract required that claimant should "furnish and deliver during the period commencing August 1, 1917, and ending September 30, 1917," the hay covered by the contract.

The hay could not be delivered except upon call. Hence it is clear that calls had to be issued at such times as to make possible the delivery within the con-

tract period. It was not sufficient that calls should be issued prior to the terminal date, for, as has been stated, the contract required delivery at the cantonment at that time. As shown by the evidence in the case, and as found by the Court of Claims, the average time required to fill a call was 25½ days, and the Court further stated that "it would have been impossible to deliver all of said hay by that time" (September 30, 1917) (R. 5). This fact was well-known to the Camp authorities, who were fully conversant with the abnormal transportation conditions then prevailing and with the difficulties encountered by claimant in complying with calls.

The last call having been irregular and improper, and having been issued at such time as to make delivery within the contract period impossible, there was no obligation upon the part of claimant to honor it. Otherwise claimant would have been required to make deliveries over a period far beyond the terminal date of the contract, and for the requirements of the Camp subsequent to the contract period. During the period of the operation of the contract and at the time of its expiration, the Government had received all the benefits thereunder to which it was rightfully entitled. It was clearly improper for the Camp Quartermaster to insist upon the claimant making deliveries subsequent to the expiration of the contract to cover requirements of the Camp which were clearly not those covered by the contract.

III.

COMPLIANCE WITH THE FIFTH CALL WAS NOT VOLUNTARY BUT WAS MADE UNDER DURESS, AND AN IMPLIED CONTRACT AROSE TO PAY FOR THE GOODS FURNISHED.

The Court of Claims found on this point as follows (Tr. 8):

> "It must be held that the plaintiff voluntarily accepted the call for 4,000,000 pounds of hay, and that it delivered the hay at the contract price. Willard, Sutherland & Company v. United States, 262 U. S. 489. William C. Atwater & Co., Inc., v. United States, 262 U. S. 495. Charles Nelson Company v. United States, 261 U. S. 17."

A careful reading of the cases cited by the Court of Claims in support of its finding on this point will, we believe, clearly show that the issues involved in those cases are entirely different from those in the present case and therefore cannot be held to be controlling here.

The *Charles Nelson Company* case requires but brief mention. That case involved a contract for a certain amount of lumber, and contained a provision requiring the contractor to deliver any quantity of a particular kind of lumber which the Government might order, the Government not being obligated to order any specific quantity. The Court held that the lumber was furnished by the contractor under such provision *during the contract period and without protest,* so that case can have no application here.

The enforceability of a provision in a contract allowing the United States to increase or decrease the

amount called for by the contract was the chief issue in the case of *Willard, Sutherland & Company vs. United States, supra.* The Government advised the contractor long before the contract expired that it should furnish an additional ten per cent of the total contract requirement, which additional amount was furnished *within the contract period.* The contractor advised the Government that "this excess would be furnished under protest, reserving the right to take the proper steps to recover the difference between the current market price and the contract price; it asked confirmation from the Department and stated that on receipt thereof, it would furnish the coal." The Government did not confirm such proposition but directed the contractor to supply the coal ordered, and the Court stated in its opinion that "appellant failed further to object and delivered the coal." It would seem from this language of the Court that it considered that the contractor had waived its earlier protest and voluntarily supplied the coal ordered.

The case of *Atwater & Company vs. United States, supra,* presented facts similar to those in the *Willard Southerland* case, and was held to be controlled by the opinion in that case.

But, whatever the Court had in mind regarding the protest in the *Atwater* and *Willard Sutherland* cases, the facts and issues presented in this proceeding are entirely different. In this case, the fifth call for 4,000,000 pounds of hay issued on September 25, 1917, being irregular and improper on its face, and further, the call being isued at such a time as to make delivery within the terms of the contract impossible, hay delivered under such call was not a delivery *under the contract.* Furthermore, such hay was not delivered *within the contract period* but was delivered long after

the contract had expired and to satisfy requirements of an entirely different period.

There can be no serious denial of the fact that claimant had no other alternative than to deliver the materials demanded and leave the matter of just compensation to be later determined by the proper authorities. From the practical standpoint, the demands of the Camp Quartermaster were the same as if the property in question had been commandeered by the Government. If claimant had refused to meet the demands of the Camp Quartermaster, it would have been confronted with the following situation:

First, the Camp Quartermaster had threatened to purchase hay in the open market and charge claimant with the difference;

Second, claimant knew from experience that if it should refuse to deliver the materials as demanded, it would be reported as defaulting on its contract and would thereafter be "black-listed" by the Government;

Third, claimant had submitted bids on other contracts with the Government, and if it was reported as defaulting on this contract such bids would not be considered by the Government; and

Fourth, claimant's organization consisted of men who did not desire at the expense of dollars and cents to assume the odium of being charged with unwillingness to aid the Government in the time of its war distress.

On this subject, the following passage from 13 C. J. 549 is pertinent:

> "One who goes beyond the requirements of his contract under circumstances of doubt should not from that fact alone have his act given the effect of a concession * * *. Acts of the parties

> which are specifically performed without prejudice to either party's interpretation of the contract, leaving the same open for future determination, cannot be considered as being on the practical construction of the contract."

The above language is in part quoted from the opinion of the Supreme Court of Vermont in the case of *McLean vs. Windham Light Company,* 85 Vermont 167, 81 Atl. 613.

The case of *Manistee Navigation Co. vs. Louis Sands Salt Co.* 174 Mich. 1, 140 N.W. 545, is also illuminative. The Court says:

> "The arrangement to advance the $15,000.00, expressly made without prejudice to either party's interpretation of the contract, but leaving the same open for future determination, not only did away with any notion of a practical construction, but also disposed of the question of estoppel raised by defendant."

The recent case of *St. Louis, B. & M. Ry. Co. vs. United States* 268 U. S. 169, involved the question whether the acceptance from the Government of a smaller amount than is due would effect the discharge of the obligation. The Court held that acquiescence by the claimant in such smaller amount would ordinarily effect a discharge, but stated:

> "But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver or from which an estoppel might arise. Every case in which this court has sustained the affirmative

> defense of acquiescence rests upon findings which include at least one of these additional features."

We submit that the present case is controlled by the decision in *Freund vs. United States*, 260 U. S. 60. There the plaintiff had a mail contract with the United States, and the United States sought to require the contractor to perform service over a different route than that covered by the contract, and involving a greater service than the route specified in the contract. The contractor protested against performing the additional and wholly different service, but, being threatened with suit on its bond, performed the service and accepted periodical payments. The Court of Claims held that the contractor had acquiesced in the additional service, but the Supreme Court held that it had not, and stated:

> "We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on."

The Court in that case cited *United States vs. Utah, Nevada & California Stage Co.*, 199 U. S. 414, and *Hunt vs. United States*, 257 U. S. 125, which cases involved facts substantially similar to those of the *Freund* case.

We quote from the language of the Court in the case of *Maxwell vs. Griswold, et al.*, 10 How. 242:

> "But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order

to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him. Now, it can hardly be meant in this class of cases that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils. He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore offici*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however, well meant may have been the views of the collector. The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

The Court in *Robertson vs. Frank Brothers Co.*, 132 U. S. 17, followed the decision in *Maxwell vs. Griswold, et al., supra,* and said:

"The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence

> the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary."

The action of the Government in the present case, as in the *Freund* and other cases cited, bears every evidence of compulsion.

The ability of the Government at all times, especially in times of war, to bear heavily upon its citizens with whom it contracts, is self-evident from the very nature of things. Whether there has ever been any general tendency among some of the officers of certain departments of the Government to exert improper and unlawful pressure upon Government contractors need not be discussed here, but it is clear that the case at bar presents a situation in which the Government contracting officer took advantage of the excitement and great public feeling then prevailing to coerce compliance with the Government's demands.

The claimant's protest against making the deliveries demanded was well taken. To have declined to make the deliveries would have been next to impossible under the then existing conditions. Claimant's proposal to make deliveries demanded and later seek an adjudication of its rights before the proper authorities was fair to both parties as it resulted in immediate delivery of material to the Government and left all differences to be adjusted at a convenient time. It certainly should be the desire and the policy of the Government to encourage every effort to bring about an amicable adjustment of matters with contractors, and not force litigation, which must ever be expensive, disagreeable and demoralizing.

To hold otherwise than that claimant was protected

by its protest would be tantamount to holding that in any dispute between the Government and the contractor the contractor must at his peril refuse to yield to the Government's demands, for otherwise he has no legal means of redress. That this cannot be the law seems manifest. Not only would such a rule not be to the advantage of the Government, but it would be distinctly detrimental to the contractor and contrary to the public interest.

The hay was delivered to the Government under an implied promise to pay for the same at the market value at the time of its delivery. Deliveries were actually made long after the period during which the contract was operative had elapsed. No other express contract had been entered into between the Government and claimant for delivery of hay at Newport News. The parties were simply in this situation: there was no longer any contract between them. The Camp Quartermaster demanded that the contractor furnish hay at a price which had been fixed in a previously existing contract. The contractor denied that any such contract was still in existence or that it was obligated to furnish hay at any such price; but it did agree to furnish the amount of hay demanded and to present its claim for the market price of the hay.

CONCLUSION.

It is respectfully submitted that it has been conclusively shown that the last call, being irregular and improper on its face, and being issued at such time as to make delivery within the contract terms impossible, was not a prope call under the contract; that the last call, therefore, was void and of no effect, and

claimant was under no obligation to make any delivery thereunder; that the contract was on September 30, 1917, completely executed as far as was possible, and remained of no further force or effect; that subsequent orders to the contractor by the Government for the delivery of any commodities whatsoever were given either under a new express contract or an implied contract; that there being admittedly no new express contract that an implied contract arose to pay the contractor for such hay at the prevailing market price; that the deliveries were made under such circumstances as to amount to complusion, in other words "moral duress, not justified by law," and that the right to demand and receive the prevailing market price therefor has not been waived or forfeited by the claimant, and that it is therefore entitled to payment in accordance with the claim as presented.

Respectfully submitted,

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April 8, 1926.